# Andree Greenberg - Save The Bay letter to Army Corps on Cargill/Redwood City

**From:** "Stephen Knight" <sknight@savesfbay.org>
**To:** <SRLee@waterboards.ca.gov>, "Andree Greenberg" <AGreenberg@waterboards.ca.gov>
**Date:** Friday, January 15, 2010 11:23 AM
**Subject:** Save The Bay letter to Army Corps on Cargill/Redwood City
**Attachments:** STB-ShuteMihaly-CorpsLetterRePJD_Jan2010.pdf

Dear Shin-Roei and Andree –

Attached is a Jan. 14 letter from Save The Bay's counsel, Shute Mihaly & Weinberger, to the US Army Corps of Engineers regarding Cargill/DMB's request for a preliminary jurisdictional determination of its retired Bay salt pond property in Redwood City.

Save The Bay's letter makes the case for regulation of the Redwood City salt ponds as wetlands under the Clean Water Act. And it details legal and factual deficiencies in an Army Corps analysis of the "normal circumstances" rule applied to the Cargill salt ponds. Noting EPA's recent objections to the same document, Save The Bay urges the Army Corps to reconsider its analysis.

Thank you for your attention to this important matter.

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January 14, 2010

**Via Email and U.S. Mail**

Jane Hicks
Division Chief
Regulatory Division
U.S. Army Corps of Engineers
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San Francisco, California 94103-1398

Re: Redwood City Saltworks' Application for a Preliminary Jurisdictional Determination

Dear Ms. Hicks:

This firm represents Save The Bay in connection with DMB Redwood City Saltworks' ("DMB") proposal to develop what is essentially a new city on the former Cargill salt ponds site ("Cargill Site") in Redwood City, California. We understand that the U.S. Army Corps of Engineers ("Corps") is currently evaluating DMB's November 12, 2009, request for a preliminary jurisdictional determination ("PJD") for the Cargill Site. DMB's application purports to conclude that almost the entire 1,478-acre Cargill Site is not jurisdictional wetlands under the Clean Water Act. Save The Bay vigorously disputes both the factual and legal conclusions underlying DMB's application.

It appears from the physical and documentary evidence that DMB's partner and predecessor Cargill, Inc. is attempting to manipulate the PJD process and the Cargill Site to evade Clean Water Act jurisdiction and its resultant responsibilities under the Act. In a letter dated February 28, 2002, Cargill requested that the Corps disclaim all jurisdiction over the Cargill Site, without even requesting a jurisdictional determination. *See* February 28, 2002 letter from Robert C. Douglass to Lt. Col. Timothy S. O'Rourke,

Corps. Between that initial request and DMB's November 12, 2009, PJD request, Cargill and DMB have apparently exerted pressure on the U.S. Environmental Protection Agency ("EPA") and the Corps to force a finding that there is no Clean Water Act jurisdiction over the majority of the Cargill Site. Specifically, Cargill has pressured both "agencies to accede to the development of the [Cargill Site] as a condition" of the purchase by the Federal government for restoration purposes of other former salt ponds owned by Cargill.[1] The Corps rightly refused to do so in 2002.

Save The Bay urges the Corps not to bow to this political pressure and instead to uphold EPA's initial conclusion that "there are strong arguments for asserting that vast majority of the Redwood City Plant Site is [sic] regulated under the Clean Water Act." *Id.* at 3. Specifically, and for the reasons set forth below, Save The Bay requests that the Corps issue a preliminary jurisdictional determination that, under the "normal circumstances" concept, substantially all of the Cargill Site is subject to Clean Water Act jurisdiction, and is properly classified, as a wetland under Section 404(b)(1) of the Clean Water Act. Alternatively, the Corps should at the appropriate time determine that the Cargill Site qualifies as a special aquatic site under either the "sanctuary and refuge" category or the "mudflats" category pursuant to 40 C.F.R. §§ 230.40(a), 230.42(a).

## I. BACKGROUND

The Cargill Site consists of a series of ponds and crystallizer beds that were used for industrial salt production from San Francisco Bay waters since the early 1950's.[2] For several decades, the normal functioning of the site and nearby salt ponds involved pumping increasingly saline water (from the adjacent San Francisco Bay) through a series of interconnected ponds, as well as levee maintenance to keep unwanted Bay water out of the system.

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[1] March 18, 2002 U.S. EPA "Cargill Overview" at 2 (hereinafter, "U.S. EPA Cargill Overview"). This document, which the Citizen's Committee to Complete the Refuge ("CCCR") obtained from the EPA via a FOIA request, is attached hereto as Attachment 1. Numerous other documents obtained via that request similarly document Cargill's political pressure on the Corps and EPA over the past decade. If the Corps does not already possess these documents, Save The Bay is willing to provide copies.

[2] More detailed information on the operations of the Cargill Site, as well as documentation for the factual statements in this background section, is provided in the January 6, 2010, Letter from David Lewis, Save The Bay, to Robert Perlmutter ("Save The Bay Ltr."), attached hereto as Attachment 2.

Since the late 1990's, however, it appears that Cargill has effectively ceased using the Cargill Site for legitimate salt production operations. As the U.S. EPA's Assistant Regional Counsel observed in a November 5, 2001 internal memorandum, "Cargill has not harvested salt at the Redwood City Plant Site for at least two years. Cargill has publicly stated its intention to cease making salt in Redwood City . . . ." November 5, 2001 Memorandum from Hugh Barroll Re Clean Water Act Jurisdiction at Cargill's Redwood City Plant Site ("Barroll Memo") at 3; *see also* U.S. EPA, Cargill Overview at 2 (noting, in 2002, that "[a]fter extensive discussions with a consortium of State and Federal agencies, Cargill agreed to shutdown [sic] its saltmaking plant at Redwood City"); *see generally* Save The Bay Ltr. at 2-3 (Cargill ceasing salt production operations at Redwood City because it could not operate at a profit).

Nevertheless, throughout the last decade, Cargill continued to maintain the levee system for the Cargill Site to keep out the immediately adjacent Bay waters and continued to pump brine water from the East Bay and onto that site. These activities, at the very least, raise serious concerns about whether Cargill was pumping this brine water onto the Cargill Site for legitimate commercial purposes or was instead doing so to prevent the site from returning to its natural state as tidal wetlands.

These concerns are only heightened by documents that CCCR recently obtained from U.S. EPA through the Freedom of Information Act. These documents show that, during this same period, Cargill has been trying to obtain assurances from Corps' headquarters that the Corps would not treat the Cargill Site as jurisdictional wetlands, notwithstanding the contrary views expressed by local Corps and EPA staff. *See supra* note 1.

On May 19, 2009, DMB submitted a land use application to the City of Redwood City that proposes to redevelop the Cargill Site into a mixed-use development project, which would includes 8,000 to 12,000 new housing units as well as extensive retail development on these formerly submerged tidal lands. After apparently securing the assurances Cargill and DMB had been seeking from Corps' headquarters over the prior decade, DMB submitted its PJD application to the Corps on November 12, 2009.

## II. UNDER THE PROPER APPLICATION OF THE CORPS' "NORMAL CIRCUMSTANCES" GUIDANCE, SUBSTANTIALLY ALL OF THE CARGILL SITE SHOULD BE CLASSIFIED AS JURISDICTIONAL WETLANDS.

As you know, Clean Water Act Section 404 makes it unlawful to discharge dredged or fill material into "navigable waters" without a permit. 33 U.S.C. §§ 1311(a), 1342(a). The term "navigable waters" is defined as "the waters of the United States,

including the territorial seas." *Id.* § 1362(7). The Corps' regulations interpret "the waters of the United States" expansively to include not only traditional navigable waters, 33 CFR § 328.3(a)(1), but also other defined waters, § 328.3(a)(2), (3); "[t]ributaries" of such waters, § 328.3(a)(5); and wetlands "adjacent" to such waters and tributaries, § 328.3(a)(7). "[A]djacent" wetlands include those "bordering, contiguous [to], or neighboring" waters of the United States even when they are "separated from [such] waters . . . by man-made dikes . . . and the like." § 328.3(c). As detailed below, under the Corps' so-called "normal circumstances" rule, the Cargill Site constitutes "wetlands" within the meaning of Section 404.

### A. The Corps' Regulatory Guidance Interpreting "Normal Circumstances"

The Corps' regulations define "wetlands" as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under *normal circumstances* do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. 328.3(b) (emphasis added). The three key indicators of wetlands are hydrophytic plant community, wetland hydrology, and hydric soils. *Id.* The "normal circumstances" element of the definition essentially establishes that a particular geographic area is normally assessed for wetland characteristics in its current condition, and "not as it may have existed over a record period of time." 42 Fed. Reg. 37122, 37128 (July 19, 1977).

However, the Corps also recognized the need to protect areas from being artificially or strategically managed to eliminate wetland characteristics, which would allow an individual to avoid jurisdiction "by destroying the aquatic vegetation." *Id.* To this end, an exception was made to the general rule that Clean Water Act jurisdiction over a site is determined based on the site conditions as they exist at the time of the jurisdictional determination. The "normal circumstances" concept embodies this exception.

While there is no regulatory definition for "normal circumstances," the Corps has issued three Regulatory Guidance Letters ("RGL") to clarify the term. *See* Regulatory Guidance Letters Nos. 82-2, 86-9, 90-7. Most recently, RGL 90-7 sought to clarify the term as it pertains to areas that are in agricultural crop production, or "cropped wetlands." This RGL found that "determining whether a disturbed area qualifies as a section 404 wetland under 'normal circumstances' involves an evaluation of the extent and relative permanence of the physical alteration of wetlands hydrology and hydrophytic vegetation." RGL 90-7 at ¶ 4. The letter found that the discussion of "normal circumstances" in the Federal Manual for Identifying and Delineating Jurisdictional Wetlands ("Manual") "is based on the premise that for certain altered wetlands, even

though the vegetation has been removed by cropping, the basic soil and hydrological characteristics remain to the extent that hydrophytic vegetation would return if cropping ceased." *Id.* at ¶ 5.c. The RGL concluded that in such circumstances, cropped wetlands may qualify as section 404 wetlands despite the absence of hydrophytic vegetation. *Id.*

The Corps recently addressed the issue of cropped wetlands in its application of the "normal circumstances" concept to an area known as the Everglades Agricultural Area ("EAA").[3] Former wetlands in the EAA had been converted to cropland and the hydrology of the site was managed artificially using pumps to keep the land dry or flood it depending on the time of year. EAA Memo at 1. Despite the fact that the active pumping had prevented the growth of hydrophytic vegetation for decades, the Corps found that it was appropriate to evaluate the EAA as it would exist without any pumping. *Id.* at 1-2. Corps Headquarters confirmed that the EAA approach was consistent with national policy. *Id.* at 1.

**B. The Cargill Site Qualifies for the Normal Circumstances Exception.**

As San Francisco District Staff explained to DMB's representatives at a June 10, 2009, pre-application meeting, in applying the normal circumstances rule to the Cargill site:

> *The central issue is the pumping of highly saline water onto the site* that would normally, without the ongoing management (i.e., salt production) have wetland plants . . . If the maintenance of the levee[s] were to stop, the levees would breach and the site would revert to having tidal water influence. Tidal influence would help restore the site to tidal wetlands.

U.S. Army Corps of Engineers, San Francisco District, July 10, 2009, Memorandum for Record, at p. 2 ("Corps' July 2009 Memo") (emphasis added).

As noted above, there are three identifying characteristics, or indicators, required for wetlands jurisdiction to attach under Clean Water Act Section 404: (1) wetland hydrology; (2) hydric soils; and (3) hydrophytic plant community. *See* 33 C.F.R. 328.3(b). It is undisputed that the majority of the Cargill Site meets the first two of these indicators. The ponds on the Cargill Site, like other similar salt ponds in the

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[3] Memorandum Thru CDR, South Atlantic Division For CDR HQUSACE, Re: Jacksonville District approach to "normal circumstances" and use of Section F of the 1987 Wetland Delineation Manual for jurisdictional determinations in the Everglades Agricultural Area (March 10, 2009) (hereinafter "EAA Memo").

South Bay region, were created by diking off tidal salt marshes to form non-tidal impoundments. Much of the topography of the salt ponds remains unchanged, and very little fill activity outside the building and maintenance of the levees has taken place. The Corps expressly recognized these characteristics in its Memorandum of Record. *See* Corps' July 2009 Memo at 2 ("If the management of the salt ponds for salt production ceased, the ponds would hold water during the rainy season (wetland hydrology) and the soils are historic bay soils that also support wetlands"); *see generally* Save The Bay Ltr. at 4-5.

Accordingly, the critical issue concerns the third wetland indicator (hydrophytic plant community) and more specifically, whether the ongoing management of the Cargill Site is preventing the reestablishment of that plant community. Corps' July 2009 Memo at 2 (the "site would normally, without the ongoing management (i.e., salt production) have wetland plants").

The San Francisco District Office of Counsel accordingly sought guidance from the Corps Headquarters on this issue, and requested that Headquarters specifically review and comment on how jurisdictional determinations made in the EAA might affect the Corps' PJD at this Cargill Site. Headquarters responded in a detailed memorandum dated October 2, 2009.[4] After a review of the applicable RGL's and its earlier guidance for the EAA, Headquarters concluded that in applying the normal circumstances rule to the Cargill Site, the Corps should consider: (1) "whether continued and on-going active management of the local hydrology . . . suppress[es] one or more wetland indicators at a site"; and (2) whether the landowner has taken steps on the property to evade Section 404 jurisdiction. *See* Corps' October 2009 Memo at 6, ¶ 11.

However, rather than addressing these two questions head-on, this memo instead focuses on the construction of the dikes and levees at the Cargill Site as "one-time" actions that altered the hydrology of the Cargill Site and severed it from the Bay. The memo contrasts this asserted "one-time" event to the active pumping activities in the EAA that prevented the growth of hydrophytic vegetation. *Id.* at 8. It accordingly concludes that the Cargill Site "should be evaluated in its current state as a salt production facility with pumps periodically moving water between the different cells, and not based on any historical conditions at [the Cargill] Site." *Id.*

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[4] Department of the Army, U.S. Army Corps of Engineers, October 2, 2009 Memorandum for South Pacific Division Commander, Re: The "normal circumstances" concept as applied to Cargill's plant Cargill Site at Redwood City, CA consisting of salt production facilities ("Corps' October 2009 Memo").

Save The Bay submits that this focus on the levees and dikes separating the ponds from the Bay is inconsistent with the Corps' prior guidance on the normal circumstances exception and should be reconsidered. While it is true that the hydrological connection between the Bay and the ponds has been altered by the construction of the levees and would not be restored immediately following the end of salt production, the ponds at the Cargill Site would continue to hold rain water for the majority of the year even without active pumping by Cargill. Corps' July 2009 Memo at 2. This means that, if the other characteristics of the wetland definition are satisfied, the ponds fall within the definition of "adjacent wetlands" despite their present lack of a direct surface connection to the Bay due to the levees. *See* 33 C.F.R. §328.3(c)

Indeed, the definition of "adjacent wetland" specifically includes wetlands that were formerly hydrologically connected to a navigable waterway, but have been artificially separated from it by man-made structures:

> the term adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'

*Id.*[5]

Moreover, the October 2009 Memo failed to address the "central issue" raised by the July 2009 Memo, which is "how much remediation and time would be necessary for wetland vegetation to [sic] colonize the site." Corps' July 2009 Memo at 2. If the facts demonstrate that "the extent and relative permanence of the physical alteration" of the Cargill Site is such that hydrophytic vegetation would begin to grow relatively shortly following the cessation of salt production, then the Corps should conclude that the "normal circumstances" of the Cargill Site should be assessed as it would exist without human management for salt production. *See* RGL 90-7 at ¶ 4.

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[5] This regulatory definition survives the Supreme Court's decision in *Rapanos v. United States*, as five of the justices agreed that wetlands adjacent to navigable waters are waters of the United States. *Rapanos v. United States*, 126 S . Ct. 2208, 2248 (2006) (Justice Kennedy, concurring) ("As applied to wetlands adjacent to navigable-in-fact waters, the Corps' conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone.").

This is particularly so given that, unlike situations in which the wetlands have been permanently "transformed into *dry land*" (*see* 42 Fed. Reg. 37128), the Cargill Site and adjacent salt ponds have been deliberately covered in partially evaporated water from San Francisco Bay. Thus, as in the Everglades Agricultural Area, the absence of hydrophytic vegetation on the Cargill Site is caused by active human management. Without the continued pumping of hyper-saline solutions into the ponds for salt production, hydrophytic vegetation may be able to re-colonize the area relatively quickly.

Corps' Headquarters' determination is disturbing (and seemingly arbitrary) for several reasons. First, as the Director of EPA Region 9's Water Division noted last week, the Corps issued this determination "without coordinating with EPA Headquarters or Region 9;" this action is "highly inappropriate given EPA's obligations under the Clean Water Act." January 5, 2010, Ltr from Alexis Strauss, EPA, to Lt. Col. Laurence M. Farrell at 1.

Second, the Corps reached exactly the opposite conclusion for the so-called Napa Plant Site, where conditions are substantially similar to the Redwood City Cargill Site. The Napa Sonoma Marsh Restoration Project has extensive documentation of very recent progress toward full restoration of crystallizers at the Napa Plant Site. *See, e.g.*, Napa Plant Cargill Site Desalting Monitoring Summary; Central Unit Construction and Monitoring; South Unit Design; and other reports from the Nov. 10, 2009, NSMRG Meeting, available at http://www.napa-sonoma-marsh.org/meetings_nsmrg.html. Nevertheless, the Corps' October 2009 Memo does not even mention the Napa Plant Site, let alone provide a reasoned basis for treating these two similarly situated sites differently.

Moreover, at other similar sites, hydrophytic vegetation has begun to re-colonize in the absence of human management through the deterioration of the levee structures and minimal remediation efforts. For example, the levees associated with a pond in Menlo Park have disintegrated over the past few years. *See* Save The Bay Ltr. at 4-5. Areas of that pond are currently revegetating due to the introduction of Bay water. *Id.* Similarly, in the South Bay, restoration and revegetation is proceeding even in the presence of a significant layer of gypsum. *Id.* at 4.

In addition, the Corps should query why Cargill has continued to pump brine and bittern into the ponds at the Cargill Site when it has publicly maintained for the last decade that its Cargill Salt operations are not economically viable and that it accordingly plans to shut down its operations at the Cargill Site. *See* Baroll Memo at 3; Save The Bay Ltr. at 1-3.

Cargill's decision to continue operations at the Cargill Site throughout its decade-long efforts to obtain a favorable jurisdiction determination, despite its admission that the plant is no longer economically viable, appears to be a deliberate effort to prevent hydrophytic vegetation from colonizing the ponds and thereby avoid Clean Water Act jurisdiction. The Corps should not accept Cargill's or DMB's own representations on these issues and must instead conduct its own independent assessment.

## III. THE CARGILL SITE ALSO APPEARS TO QUALIFY AS A SPECIAL AQUATIC SITE PURSUANT TO THE REGULATORY DEFINITIONS FOR "SANCTUARIES AND REFUGES" AND "MUDFLATS."

In addition to granting special status to wetlands, the U.S. EPA's Section 404(B)(1) Guidelines (40 C.F.R. §§ 230-233) ("Guidelines") grant special status to several other categories of special aquatic sites. Special aquatic sites are defined as:

> geographic areas, large or small, possessing special ecological characteristics of productivity, habitat, wildlife protection, or other important and easily disrupted ecological values. These areas are generally recognized as significantly influencing or positively contributing to the general overall environmental health or vitality of the entire ecosystem of a region.

40 C.F.R. § 230.3(q-1).

Two other special aquatic site categories also appear to apply here. Specifically, the Cargill Site has been "designated under State or Federal laws . . . to be managed principally for the preservation and use of fish and wildlife sources," as the Cargill Site is within the authorized expansion boundary of the Don Edwards San Francisco Bay National Wildlife Refuge. 40 CFR §230.40(a). Additionally, there is strong evidence that the salt ponds on the Cargill Site meet all the physical criteria for "mud flats" as defined at 40 C.F.R. § 230.42(b), and therefore the site should be classified as a special aquatic site under this category as well.

Accordingly, even if the Corps concludes that the Cargill Site does not possess all of the necessary wetlands characteristics under the "normal circumstances" concept, it should conclude that the site qualifies as a special aquatic site under one or both of these categories.

## IV. THE ENTIRE CARGILL SITE IS ALSO SUBJECT TO RIVERS AND HARBORS ACT JURISDICTION.

The Cargill Site is also subject to Rivers & Harbors Act jurisdiction as waters of the United States. Jurisdiction under the Rivers & Harbors Act extends to the mean high water mark of tidal waters, as determined by the land's natural, unobstructed state. *Leslie Salt v. Froelke*, 578 F.2d 742, 753 (9th Cir. 1978). It is undisputed that substantially all of the Cargill Site would lie beneath the mean high water mark and would be inundated with tide water if the levees were breached or removed. Therefore, the Corps should determine that Cargill is required to obtain a Rivers and Harbors Act permit before it can conduct any fill operations on this land.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP

Robert "Perl" Perlmutter
Brianna R. Fairbanks

cc: Alexis Strauss, U.S. EPA
Hugh Barroll, U.S. EPA
Mary Goodenough, U.S. Army Corps of Engineers
Will Travis, BCDC
Bruce Wolfe, San Francisco Regional Water Quality Control Board
David Lewis, Save The Bay

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# ATTACHMENT 1

3-18-2002

## Cargill Overview

### Saltmaking and San Francisco Bay

Due to the combination of a shallow salt water bay and a seasonally arid climate, San Francisco Bay is an ideal location for manufacturing salt through a solar evaporation process. The basic saltmaking operation is simple. Bay water is impounded and allowed to evaporate. This concentrates the salts until sodium chloride crystallizes out. After crystallization occurs, the remaining water is removed from the impoundment. The salt crystals are then harvested.

Saltmaking operations in the bay predate the European occupation of the Bay Area. Following European occupation of the area, numerous small commercial operations initiated saltmaking operations, primarily in the salt marshes on the fringe of south San Francisco Bay. During the 20th century, these operations expanded dramatically, while undergoing significant corporate consolidation. By the enactment of the Clean Water Act in 1972, Leslie Salt (Cargill's predecessor) was the dominant solar salt maker in San Francisco Bay, using roughly 40,000 acres on the fringe of San Francisco Bay to make salt.

Leslie harvested salt in Plant Sites (where the crystallization and harvesting occurred) in Napa County, Redwood City and Newark. Leslie's Napa Plant Site was fed by roughly 10,000 acres of evaporation ponds (which concentrate the salts prior to crystallization) on the fringe of the North Bay. Leslie's Redwood City and Newark Plant Site were (and still are) fed by roughly 25,000 acres of evaporation ponds ringing the South Bay. The attached map shows the location of the three Plant Sites and the salt evaporation ponds that feed the Redwood City and Newark Plant Sites. Attachment 1.

While salt ponds provide important habitat for some species, the loss of roughly 40,000 acres of salt marsh and associated aquatic habitats to saltmaking has significantly impaired the environmental functions of San Francisco Bay. A number of species dependent on salt marsh habitat are in severe decline in San Francisco Bay. In addition, the flood storage and water quality improvement functions of salt marshes have been substantially impaired. Urban development has also significantly contributed to these impacts. However, unlike areas lost to urban development, wetlands used for saltmaking operations can be restored once saltmaking operations cease. In light of the enormous potential for wetland restoration presented by Cargill's saltmaking facilities, the Bay Ecosystem Habitat Goals acknowledged that the fate of Cargill's South Bay facilities was crucial to achieving the habitat goals in the South Bay.

In the past 25 years, Leslie and now Cargill have been gradually reducing the scope of saltmaking operations in San Francisco Bay. In 1979, Leslie sold roughly 12,000 acres of salt ponds and other aquatic features in the South Bay to the United States. This formed the core of the San Francisco Bay National Wildlife Refuge. However, Leslie retained the right to continue making salt on the 10,000 acres of salt ponds included in the sale, a right Cargill continues to exercise.

In 1993, Cargill decided to shut down its 11,000 acre saltmaking operation in Napa



ATTACHMENT 1

County. It sold 10,000 acres of salt ponds to the State of California for restoration - a purchase funded in part by money generated from the settlement of EPA and other agency enforcement claims resulting from the 1988 Shell Oil spill in Martinez. Cargill retained the 1,400 Napa Plant Site, hoping the property could be commercially redeveloped.

In 1998, Cargill decided to again reduce and refocus its saltmaking operations. After extensive discussions with a consortium of State and Federal agencies, Cargill agreed to shutdown its saltmaking plant at Redwood City and make 19,000 acres of salt ponds (including the 1,450 acre Redwood City Plant Site) available for restoration. These are the green areas of Attachment 1. Approximately 3,000 acres of these ponds had been part of the 1979 purchase. As to these ponds, Cargill was agreeing to surrender its contractual operating rights. Once Cargill completes this restructuring of its operations, it will continue to make salt on roughly 10,000 acres in the South Bay, primarily in Newark and Fremont. These are the blue areas of Attachment 1. Of this 10,000 acres, roughly 7,000 acres consists of the remaining salt ponds purchased by the United States in 1979. The remaining 3,000 acres consists of Cargill's Newark Plant Site.

**The Proposed Purchase**

The Federal and State government have not been able to accept all of the property Cargill has offered to sell. After three years of negotiations, the current transaction under discussion resolves the status of roughly 17,500 acres of the 19,000 acres Cargill has made available for purchase. Senator Feinstein's office is currently taking the lead in structuring this transaction. In general terms, the Federal and State government will acquire between 15,000 and 16,000 acres of salt ponds for restoration. The City of San Jose and the Santa Clara Valley Water District are each acquiring a salt pond, bringing the total acreage being acquired to 17,500 acres. However, none of the interested governmental agencies are willing to purchase the 1,450 acre Redwood City Plant Site.

The Redwood City Plant Site is not included in the proposed purchase because Cargill is convinced that the parcel is developable. Cargill would be willing to sell the parcel, but only at a price that reflects its value as developable real estate in the heart of Silicon Valley. None of the potential funders of the proposed transaction are willing to pay the additional $100 to $200 million necessary to include the Redwood City Plant Site in this transaction.

However, Cargill has consistently taken the position that it will not allow the Federal and State governments to "cherry-pick" the transaction - purchasing the relatively low price salt evaporation ponds, while leaving Cargill with the costly Redwood City Plant Site. Cargill has insisted that any transaction involving the salt ponds must also resolve the status of the Plant Site. Since the funders will not pay for the purchase of the Plant Site, Cargill has insisted that the regulatory agencies accede to the development of the Plant Site as a condition of the deal. This issue is discussed in more detail in the attached Cargill Salt Pond Acquisition Issue Paper (Attachment 2) and the attached Redwood City Plant Site Options memo (Attachment 3). Specifically, Cargill is asking that EPA and Corps of Engineers determine that the Redwood City Plant Site is not a regulated water of the United States. A draft EPA/Corps response rejecting

that position is attached. Attachment 4. Also attached are Questions and Answers to explain an EPA/Corps determination that the Plant Site is subject to Clean Water Act regulation. Attachment 5.

**Saltmaking and the Clean Water Act**

Since almost all of Leslie's (now Cargill's) saltmaking facilities were constructed prior to the enactment of the Clean Water Act, the regulatory agencies have generally taken the position that the operations may continue without permits other than permits needed for discharges from the saltmaking operations. However, EPA, the Corps of Engineers and the State of California have generally taken the position that the saltmaking impoundments constructed within the margin of San Francisco Bay remain regulated aquatic features. Cargill has never accepted this position, and this has led to substantial State and Federal litigation regarding the scope of regulatory jurisdiction.

The critical Clean Water Act issue for purposes of the proposed purchase is the jurisdictional status of the Redwood City Plant Site. In summary, there are strong arguments for asserting that the vast majority of the Redwood City Plant Site are regulated under the Clean Water Act - a position Cargill finds unacceptable. However, it should be noted that, following the 2001 Supreme Court decision in Solid Waste Authority of Northern Cook County v. U.S. Army Corps of Engineers ("SWANCC"), the status of much of EPA's Clean Water Act regulatory jurisdiction is in question. If this matter is ever litigated, it is difficult to predict how a court will rule on the jurisdictional status of the Redwood City Plant Site. A detailed legal analysis of the jurisdictional issues is attached. Attachment 6.

## Cargill Salt Pond Acquisition

**Issue:** Cargill, Inc. has substantially scaled back its salt-making operations in San Francisco Bay, making roughly 19,000 acres of salt ponds on the fringe of the bay available for purchase and restoration. For the last three years, a consortium of federal and state agencies have been negotiating with Cargill to purchase some or all of the properties.

**Concerns:** Acquiring and restoring these ponds is critical to restoring the health of San Francisco Bay. Funds are available for the purchase of all the ponds except the 1,450 acre Redwood City Plant Site. In addition, there is no definite funding source for maintenance and restoration of the ponds once acquired. Some money may be made available from foundations to start this effort. San Francisco Airport has expressed an interest in funding the restoration project as part of its mitigation for its runway expansion project. However, the runway project is presently on hold, and the relevant agencies are far from determining that it is permittable. Significant flood control issues will need to be addressed as part of any restoration effort.

Cargill has made resolution of the status of the Redwood City Plant Site a precondition to finalizing the purchase of the remaining 17,500 acres of salt ponds. Cargill's position is that the 1,450 acre Plant Site is not subject to regulation under the Clean Water Act and is, hence, developable. Cargill wants either to be paid development value for this parcel, or to receive a disclaimer of Clean Water Act regulatory jurisdiction so that it can proceed with its development plans. Either approach will generate substantial opposition from environmental groups. Funding is not expected to be available to pay development value for this parcel.

**Current Status/Actions:** $33 million is currently earmarked for the land acquistion. In addition, approximately $70 million may be made available for the acquisition from the recently passed State bond measure. U.S. Fish and Wildlife Service and California Wildlife Conservation Board are negotiating the terms of the acquisition with Cargill. Secretary Norton has publicly expressed her support for the acquistion.

Cargill has formally requested that the Corps of Engineers disclaim Clean Water Act jurisdiction over the Plant Site and informally requested that EPA issue a letter concurring with this disclaimer. Cargill has been informed by Corps of Engineers staff that the Agencies have tentatively concluded that they cannot give Cargill the requested disclaimer. Cargill has requested a meeting with the Corps and EPA prior to issuance of a formal response. This meeting is scheduled for March 28th at 2:00 pm.

**Interest from Elected Officials:** Senator Feinstein has been actively engaged in negotiating a funding package for the acquisition of Cargill's properties. Her staff has indicated that she is not seeking funding sufficient to acquire the Redwood City Plant Site. Her staff has also indicated that the regulatory agencies should answer Cargill's questions regarding the status of the Plant Site, but have not weighed in on the substantive jurisdictional issue. The rest of the Bay Area delegation has been briefed on the acquisition and (with the possible exception of Congressman Ose) is supportive. State legislators interested in the transaction include Senators Burton and Sher.

# ATTACHMENT 2

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saveSFbay.org

January 6, 2010

Robert Perlmutter
Shute Mihaly Wienberger
396 Hayes St.
San Francisco, CA 94102

RE: "Normal Circumstances" at Cargill's Redwood City salt ponds

Dear Mr. Perlmutter:

As you requested, we have prepared this background report on the operations of the salt ponds at Cargill's Redwood City site over the past decade. In preparing this report, we have consulted extensively with Lynne Trulio, a Professor of Environmental Studies at San José State University who served as Lead Scientist to the South Bay Salt Pond Restoration Project from 2003 to 2008.

As Save The Bay documented in its 2002 report, *Salt Into Gold*, "all 26,190 acres of South Bay salt ponds are potentially restorable to a mix of tidal marsh, open water, and related habitats that will provide tremendous ecological benefit to the Estuary's fish, wildlife, and water quality."[1] The evidence is strong and growing regarding the widespread use of wildlife, including special status species, in this and similar salt pond and crystallizer habitat.[2] In particular, "crystallizer ponds can be quickly converted to habitat suitable for shorebirds, especially the threatened Western snowy plover, which will further reduce restoration costs for the salt pond complex."[3] The Napa Sonoma Marsh Restoration Project has extensive documentation of very recent progress toward full restoration of crystallizers at the Napa Plant Site, where conditions are substantially similar to the Redwood City site.[4]

The typical functioning of the Redwood City salt ponds to produce salt involved introduction of Bay water by pumping of increasingly saline San Francisco Bay water through a series of interconnected ponds, as well as levee maintenance to keep unwanted Bay water out of

[1] Cynthia Patton, *Turning Salt Into Environmental Gold: Wetland Restoration in the South San Francisco Bay Salt Ponds.* Save San Francisco Bay Association, (2002). p3.
[2] *Salt Into Gold*, at 12. See also Western Snowy Plover 2009 Nesting Survey and California Least Tern Nesting Survey, Nov. 10, 2009, NSMRG meeting, available at http://www.napa-sonoma-marsh.org/meetings_nsmrg.html.
[3] *Salt Into Gold*, at 4.
[4] See, e.g., Napa Plant Site Desalting Monitoring Summary; Central Unit Construction and Monitoring; South Unit Design; and other reports from the Nov. 10, 2009, NSMRG Meeting, available at http://www.napa-sonoma-marsh.org/meetings_nsmrg.html.

the system.[5] "The initial, passive component of the salt production process occurs through a consecutive series of evaporation ponds of increasing salinity...."[6]

The brine moves through the ponds by a combination of gravity flows and pumping. In a series of eight evaporator ponds, the volume of brine reduces nearly 70 percent, and salinity increases. In the ninth evaporator pond, known as the "pickle" pond due to the high salt content of the brine, 95 percent of the intake pond's original water volume has evaporated. In the last stage of production, the "crystallizer" pond, the common salt (sodium chloride) precipitates out of the pickle ....[7]

As part of the post-harvesting desalting process, Bay water was then brought directly into the site via a water control device in adjacent First Slough.[8]

USEPA has stated that the "elevations of the crystallizers are below MHW."[9] And Cargill has stated that "once the Site was leveed off, certain events have occurred which tended to lower the elevation of its interior... include[ing] construction activities (compaction) associated with creating the crystallizer bed floors and general subsidence in the South Bay Area due to groundwater draw down."[10]

As typical of salt production facilities around San Francisco Bay,[11] the salt ponds in Redwood City are numbered so as to indicate their stage in this evaporation process (see *Salt Into Gold*, Map 1), with Pond Number 1 being the entry point for Bay water and so on through the series of evaporation ponds directly adjacent to the Redwood City crystallizer ponds, Ponds Number 8E and 8W.[12]

Following the 2003 sale of salt ponds to the state and federal governments, Cargill no longer owns the evaporator ponds at Ravenswood which had served as the partial source of concentrated brine for the Redwood City salt plant site. Ponds Number 1-5 on the south / Menlo Park side of Bayfront Park (as shown in Map 1 from the *Salt Into Gold* report) are now in public ownership and no longer available to Cargill as part of the salt evaporation process in the west Bay.

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[5] DMB Associates, Environmental Assessment (July 10, 2006), at 3, available at http://www.redwoodcity.org/cds/planning/saltworks/pdf/application/Environmental_Assessment_Form.pdf; *Salt Into Gold*, at 11 (maintenance), available at http://www.savesfbay.org/atf/cf/%7B2D306CC1-EF35-48CC-B523-32B03A970AE5%7D/SALT%20PONDS%20REPORT.pdf .

[6] DMB Associates, Environmental Assessment (July 10, 2006), at 3.

[7] See South Bay Salt Pond Restoration Project, http://www.southbayrestoration.org/Cargill%20background%20report.html, citing *Salt Into Gold*, at 10-11.

[8] Robert Douglass, Cargill, letter to USACE Lt. Col Timothy O'Rourke (Feb. 28, 2002), at 3.

[9] Memo, Hugh Barroll, USEPA, Clean Water Act Jurisdiction at Cargill's Redwood City Plant Site, 11/5/2001, at 3.

[10] Robert Douglass, Cargill, letter to USACE Lt. Col Timothy O'Rourke (Feb. 28, 2002), at 4 n4.

[11] *Salt Into Gold*, at 10, fig. 2.

[12] *Salt Into Gold*, Map 1. (The crystallizer ponds are then themselves separately numbered 1- 9.)

In 2006, Cargill formally announced that it was closing the salt production facilities in Redwood City because it could no longer operate them at a profit.[13] "After more than 100 years, salt harvesting is no longer economically viable in Redwood City," Cargill's land Manager, Paul Shepard, told the Redwood City community in his letter.[14] The USEPA observed in 2001 that "Cargill has not harvested salt at the Redwood City Plant Site for at least two years. Cargill has publically stated its intention to cease making salt in Redwood City...."[15] Again in 2002, USEPA noted that "After extensive discussions with a consortium of State and Federal agencies, Cargill agreed to shutdown [sic] its saltmaking plant at Redwood City...."[16]

In 2006, DMB Associates' John Bruno introduced himself as Cargill's partner in preparing a development plan for the salt pond site in a letter to Redwood City residents, noting that "salt manufacturing operation at [Cargill's] Redwood City facility will be winding down over the next few years."[17]

Notwithstanding this clear public record regarding the closure of the site, the loss of the neighboring evaporation ponds, and Cargill's repeated public declaration that salt-making is no longer economically viable in Redwood City, DMB Associates began to suggest in mid-2008 that "continued salt harvesting"[18] was the only alternative to approval of a housing development on the Redwood City salt ponds. As detailed in DMB Associates' development application to the city of Redwood City in May 2009, any future saltmaking in Redwood City is entirely dependent upon pumping of all the necessary brine across San Francisco Bay to the Redwood City plant from ponds in the East Bay:

> The initial, passive component of the salt production process occurs through a consecutive series evaporation ponds of increasing salinity.... The initial evaporation ponds, *located across the Bay from the Saltworks Site*, take in Bay water.... This water is then rotated within the pond system as evaporation causes its salinity to increase. For three to four years after entering the evaporation ponds, the salt content concentrates in this passive evaporation process and the liquids are advanced through the system of evaporators.
>
> The resulting saturated brine industrial solution ("Industrial Solution") is then *pumped across the Bay via a trance [sic] Bay pipeline* to the Salt Production Facility in Redwood City.[19]

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[13] See, e.g., Allison Lurie, *Cargill Salt Plans to Shut Down Redwood City Plant*, INSIDE BAY AREA, June 22, 2006; Paul Shepard, Cargill, "Dear Redwood City Neighbor," Summer 2006.
[14] Paul Shepard, Cargill, "Dear Redwood City Neighbor," Summer 2006 (undated).
[15] Memo, Hugh Barroll, USEPA, Clean Water Act Jurisdiction at Cargill's Redwood City Plant Site, 11/5/2001, at 3.
[16] USEPA, Cargill Overview (3-18-2002), at 2.
[17] John Bruno letter to Redwood City residents, Aug. 2006 (undated).
[18] Mailer, DMB Associates, Saltworks: Choices For the Future, June 2008 (undated).
[19] DMB Associates, Environmental Assessment (May 19, 2009 development application), at 3 (emphasis added).

According to a US Army Corps of Engineers memo on normal circumstances as applied to the Cargill site (dated October 2, 2009), "normal circumstances" are those that would occur in a location without "on-going active management that continually alters a site's hydrology and/or vegetation". Such on-going activities that prevent the establishment of wetland characteristics include activities such as pumping to keep water off a site and prevent wetland establishment. "One-time" alterations of a site that change the character from wetland to upland do not apply to "normal circumstances".

Levees for salt ponds around the San Francisco Bay were built to cut off tidal action from natural wetlands in order to allow development of shallow ponds to hold water. Without these levees, tidal action is restored and former salt ponds return to wetlands, the historic natural community. In the South San Francisco Bay (roughly south of the San Mateo Bridge), sedimentation rates are high, facilitating rapid marsh formation in breached former salt ponds. Examples of rapid marsh restoration of South Bay salt ponds after breaching are numerous. For example, at Cooley Landing in East Palo Alto, a shallow subsided site where the historic channels were still evident at the time of breaching, fifteen percent of the site was covered with marsh vegetation within three years of levee breaching (Philip Williams & Associates, Ltd. and Faber, 2004).[20] The Faber Marsh, also in East Palo Alto, was 50% covered by wetland vegetation in 5-10 years.[21] The "Island Ponds" in Alviso, three gypsum-covered ponds with some channels still evident, were breached in March 2006 and by June 2008 wetland vegetation had begun to establish on the site (Callaway, 2008).[22] Within 15 years of breaching a former 117-acre crystallizer pond – the LaRiviere Marsh in Fremont was completely covered with vegetation and was supporting breeding California clapper rails.[23]

Conditions at the Cargill ponds in Redwood City are similar to those at these sites just described. The Cargill ponds were originally tidal salt marsh; they are at approximately the same elevation relative to the tides as the Island Ponds in Alviso;[24] there are channels evident over approximately half the site; the other half the site is crystallizer pond, such as was restored at the LaRiviere Marsh. Only the levee separating these ponds from the Bay, which alters the natural tidal hydrology of the site, prevents the ponds' return to their original wetland condition.

The October 2, 2009, US Army Corps letter states inaccurately that the altered hydrology on the Cargill site was due to a "one-time" activity and that actions do not need to be taken

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[20] Philip Williams & Associates, Ltd. and P.M. Faber. 2004. Design Guidelines for Tidal Restoration in the San Francisco Bay. The Bay Institute and the California State Coastal Conservancy. Oakland, CA. 83pp.

[21] Ibid.

[22] Callaway, J. 2008. Wetland Sediment Dynamics at the Island Ponds: Two Years and Counting. Presentation to the 2008 South Bay Science Symposium. 25 September 2008. San Jose State University, San Jose, CA; Ponds A19-21, South Bay Salt Pond Restoration Project, Initial Restoration Actions (Alviso Area), available at http://www.southbayrestoration.org/images/Pond%20Maps/alviso.pdf.

[23] (F. LaRiviere, pers. comm.); South Bay Salt Pond Restoration Project. 2005. A Status Report to Stakeholders and Other Interested Parties, http://www.southbayrestoration.org/pdf_files/ISP%20Summary%20Report%20March%202005.pdf. Accessed on January 5, 2010.

[24] Seigel, S.W. and P.A.M. Bachand. 2002. Feasibility Analysis of South Bay Salt Pond Restoration, San Francisco Bay Estuary, California. Wetlands and Water Resources, San Rafael, California. 228pp.

to continually alter the hydrology of the site. In fact, the approximately 80-miles of external levees[25] around the South Bay ponds require constant maintenance to prevent their deterioration and the subsequent flooding of the salt pond system and upland area. Over the years, Cargill has maintained the levees constantly, repairing and rebuilding many miles of levee every year, in order to fight back the natural action of tides and weather which wear down the levees. Because levee maintenance is a continual requirement for pond protection, the US Fish and Wildlife Service and the California Department of Fish and Game developed the Initial Stewardship Plan (ISP) when they took over ownership and management of 15,000 acres of ponds from Cargill beginning in 2003.[26] One of the key purposes of the ISP was to review different alternatives with respect to levee maintenance. The "No Action" alternative, which eliminated levee repair, was not accepted as the environmental preferred alternative, in large part, because analysis showed that without maintenance the levees would fail at unpredictable times, especially as sea-level rise is expected to reach 16 inches or more by 2050 and would inundate the Cargill ponds in Redwood City at that height.[27] High tides combined with storm surges can be expected to result in increasing water overtopping the exterior levees, which will put Bay water into the ponds for periods of time, resulting in seasonal wetland characteristics and the growth of wetland vegetation, especially on the non-graded areas. Graded areas are likely to resemble pannes, which are natural salt expanses with approximately 10% vegetation. For one example, levees associated with an evaporator pond in Menlo Park adjacent to the Redwood City salt ponds, at the foot of the Dumbarton Bridge, have disintegrated over the past few years.[28] Areas of that pond are currently revegetating due to the introduction of the Bay water.[29]

In summary, preventing wetland conditions on the Cargill site requires on-going activities that change the hydrology of the site. The area has not been converted to upland by a "one-time" permitted action. Rather, levees on the site must be constantly maintained to prevent restoration of wetland conditions, underscoring that, in fact, the "normal circumstances" for the 1433-acre Cargill pond site in Redwood City is wetland.

Sincerely,

David Lewis

David Lewis, Executive Director

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[25] Ibid.
[26] Life Science! Inc. 2004. Final South Bay Salt Pond Initial Stewardship Plan, EIS/EIR. U.S. Fish and Wildlife Service, Newark, CA.
[27] San Francisco Bay Conservation and Development Commission. 2009. Shoreline Areas Vulnerable to Sea Level Rise: South Bay. http://www.bcdc.ca.gov/planning/climate_change/maps/16_55/south_bay.pdf . Accessed on January 5, 2010.
[28] Unnumbered pond on east side of Ponds R1 & R2 on South Bay Salt Pond Restoration Project, Initial Restoration Actions (Ravenswood Area), available at http://www.southbayrestoration.org/images/Pond%20Maps/ravenswood.pdf .
[29] Conversation with Mendel Stewart, Fish and Wildlife Service, December 15, 2009.

**From:** Andree Greenberg
**To:** Stephen Knight
**CC:** Shin-Roei Lee
**Date:** Tuesday, December 15, 2009 7:44 AM
**Subject:** Re: Cargill PJD filing & other 2 documents

Hi Stephen,
Thank you for the PJD document. I realized after our meeting that Barbara Ransom had told me she filed it in a voice mail, and said they were putting the jurisdictional battles behind them in that they agreed to classify most of the site as jurisdictional. She said Cargill wants to look at the benefits of the site. I requested hard copies from her yesterday of that PJD and the 50-50 plan submitted to Redwood City and she will send them to me.

Thanks for your informative presentation yesterday and for the other 2 documents you sent -- we will review these and gt back to you if we have questions or issues to discuss.
Andree

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>>> "Stephen Knight" <sknight@savesfbay.org> Monday, December 14, 2009 3:32 PM >>>
Dear Andree -

Attached is a copy of Cargill's November filing with the Army Corps.

Thank you.

Stephen Knight
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